

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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| CHRISTOPHER GESSNER, | : | |
| Plaintiff | : | No. 1:12-cv-02185 |
| | : | |
| v. | : | (Chief Judge Kane) |
| | : | |
| MAZZITTI AND SULLIVAN, <u>et al.</u>, | : | (Magistrate Judge Carlson) |
| Defendants | : | |

MEMORANDUM ORDER

Presently pending before the Court are two Reports and Recommendations of Magistrate Judge Carlson, recommending that Defendants' motion to dismiss Plaintiff's complaint be granted (Doc. No. 18) and that Plaintiff's motion for leave to amend his complaint be denied (Doc. No. 21). Plaintiff failed to file objections to either Report and Recommendation.¹ For the reasons that follow, the Court will adopt both Reports and Recommendations.

The relevant allegations raised in Plaintiff's complaint are comprehensively set forth in Magistrate Judge Carlson's May 14, 2013 Report and Recommendation and need not be reproduced in their entirety here. (Doc. No. 18.) In short, Plaintiff, a state prisoner proceeding pro se, raises negligence claims against Defendant Mazzitti and Sullivan, a private drug and alcohol counseling service, and its employees under 42 U.S.C. § 1983. On April 11, 2013, Defendants filed a motion to dismiss Plaintiff's complaint. (Doc. No. 14.) Plaintiff failed to respond to the motion, and Magistrate Judge Carlson recommended that the complaint be

¹ The Magistrate Act, 28 U.S.C. § 636, and Rule 72(b) of the Federal Rules of Civil Procedure, provide that any party may file written objections to a magistrate's proposed findings and recommendations. In deciding whether to accept, reject, or modify the Report and Recommendation, the Court is to make a de novo determination of those portions of the Report and Recommendation to which objection is made. 28 U.S.C. § 636(b)(1).

dismissed on May 14, 2013. (Doc. No. 18.) Plaintiff moved to amend his complaint on May 15, 2013 (Doc. No. 19), and Magistrate Judge Carlson recommended that the motion to amend be denied on June 17, 2013 (Doc. No. 21).

Plaintiff has failed to object to any portion of either Report and Recommendation, and, upon a review of Plaintiff's complaint and the Reports and Recommendations, the Court detects no error in Magistrate Judge Carlson's findings and recommendations. In his complaint, Plaintiff raises a negligence against Defendants under Section 1983. (Doc. No. 1.) As outlined in the May 14, 2013 Report and Recommendation, to state a claim under Section 1983, a plaintiff must allege that the defendants were acting under color of state law when they allegedly deprived him of a federally protected right. See, e.g., Parratt v. Taylor, 451 U.S. 527, 535 (1981). Plaintiff failed to raise such allegations in his complaint and, thus, the Court will adopt Magistrate Judge Carlson's recommendation that Defendants' motion to dismiss Plaintiff's complaint be granted.²

Further, the Court will adopt Magistrate Judge Carlson's Report and Recommendation issued on June 17, 2013, recommending that Plaintiff's motion for leave to amend his complaint be denied. (Doc. No. 21.) As discussed by Magistrate Judge Carlson, although Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend should be freely given when justice so requires, a district court has the discretion to deny such a motion where granting leave to amend would be futile. See, e.g., Hill v. City of Scranton, 411 F.3d 118, 134 (3d Cir. 2005).

² The Court also detects no error in Magistrate Judge Carlson's findings that Defendants' motion to dismiss should be deemed unopposed under Local Rule 7.6 and that the motion should be granted because Plaintiff had failed to timely prosecute this action pursuant to Rule 41 of the Federal Rules of Civil Procedure. (Doc. No. 18 at 3-10.)

The Court agrees with Magistrate Judge Carlson's conclusion that Plaintiff's efforts to amend his complaint would be futile because he may not raise state-law claims of negligence against private parties in federal court under 42 U.S.C. § 1983. (Doc. No. 21 at 12-23.)

ACCORDINGLY, on this 23rd day of July 2013, **IT IS HEREBY ORDERED THAT**:

1. Magistrate Judge Carlson's May 14, 2013 Report and Recommendation (Doc. No. 18) and June 17, 2013 Report and Recommendation (Doc. No. 21) are **ADOPTED**;
2. Defendants' motion to dismiss Plaintiff's complaint (Doc. No. 14) is **GRANTED**;
3. Plaintiff's motion for leave to amend his complaint (Doc. No. 19) is **DENIED**;
4. Plaintiff's motion for service of process (Doc. No. 23) is **DENIED AS MOOT**; and
5. The Clerk of Court is directed to close the case.

S/ Yvette Kane
Yvette Kane, Chief Judge
United States District Court
Middle District of Pennsylvania